at the time of the crucial meeting on 15th October, 1967, a member of the M.I.C.

The third question is, on these facts, was the judge right in refusing to issue an interim injunction against the defendants. As has been seen, he refused because the Kampong Pandan branch was an unlawful society, no member of an unlawful society could acquire a right founded on an unlawful body which could neither sue nor be sued. If at the relevant time the branch was an unlawful society, then by virtue of section 42 of the Societies Act any office-bearer and any person managing or assisting in its management, such as the defendants, committed a serious offence (punishable with up to five years imprisonment) and the effect of the plaintiffs' application for an injunction was to request the court to prevent the commission of acts which would be criminal. Now, injunctions in the Malay States are dealt with in Part III of the Specific Relief (Malay States) Ordinance, 1950. This corresponds to Chapters IX and X of the Indian Specific Relief Act, 1877. With regard to the Indian Act, it was said by Beaumont C.J. in a Bombay case, *Ramdas Khatau & Co.* v. *Atlas Mills Co. Ltd.*,[5] that the Act was not exhaustive and it was open to the courts in Bombay to rely on English cases on injunctions. With respect I agree that the same applies to the courts in the Malay States. In England it was held as long ago as in 1861 in *Emperor of Austria* v. *Day* [6] that the courts have no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal and do not affect any rights of property. So as there is no evidence here of the plaintiff's rights of property having been affected, the judge was right in refusing to issue the injunction sought, assuming that the Kampong Pandan branch was an unlawful society.

But, as has been seen, by the time of the hearing of arguments on the second day the branch had undergone a metamorphosis — it had become a lawful society. The position at the time of arguments then was this: the plaintiff and the defendants were members of the M.I.C., the Kampong Pandan branch was a lawful society, but as at the time of the defendants' election to its committee on 15th October, 1967, it was an unlawful society, persons who took part in the election committed an offence (section 43 of the Societies Act) and therefore the election was, in my judgment, null and void and the defendants were not office-bearers at all. In view of this, the learned judge (had he wanted to) could have issued an injunction restraining the defendants from acting as members of the committee.

Finally, what is the order that should be made in this appeal? Clearly, this court cannot order an interim injunction to issue against the defendants as prayed, nor does Mr. Lim desire us to do so. The reason is that since the judgment fresh elections for 1968/1969 have been held by the branch and a fresh set of committee members has been elected. In view of this, Mr. Lim asked us merely to allow the appeal without at the same time issuing an injunction, as otherwise the defendants would have been unjustly mulcted in costs.

No matter what the decision of the learned judge might have been had he realized that at the time of his judgment the branch was a lawful society, this court is bound to consider the matter as things stand today. As things stand today, events have overtaken the parties, and should this matter ever go to trial it would be quite futile to issue the plaintiff the injunction sought as there is now no question of the defendants acting as committee members. In view of this, the justice of the case would in my judgment be met if this appeal were to be dismissed, and I accordingly dismiss it.

I have given much thought to the question of costs and come to the conclusion that the most appropriate order in the circumstances would be to make no order as to costs of this appeal. Further the learned judge's order as to costs should be and is hereby set aside because the election of office-bearers in any event was illegal and void and the defendants were at fault and not lawful office-bearers as claimed. Here again there should be no order as to costs.

Azmi L.P. and **Ong Hock Thye C.J. (Malaya)** concurred.

Appeal dismissed.

Solicitors: *Ranjit, Thomas & Kula; Athi Nahappan & Co.*

KUO GEOK SUI v. LING PING KWONG

[O.C.J. (B.T.H. Lee J.) January 7, 1969]
[Sibu — Suit No. 23 of 1968]

Landlord and Tenant — Controlled premises — Claim by owner for possession — Whether occupier was licensee or tenant — Rent Control Ordinance (Sarawak Cap. 86).

Under an agreement dated January 4, 1966 and written in Chinese the defendant occupied certain rent controlled premises belonging to the plaintiff. The agreement was for an initial period of one year and renewable. It was renewed for one year. The plaintiff had the right to repossess the premises for his own use upon giving three months' notice. The defendant was referred to as "tenant" in the agreement and the plaintiff issued rent receipts marked "Shop Rent Receipt".

By a letter dated September 25, 1967 and written in Chinese the plaintiff gave the defendant notice to quit the premises but did nothing pursuant to the notice and the defendant continued to occupy the premises. On February 29, 1968 the plaintiff through her solicitors gave the defendant one month's notice to quit the premises referring to the defendant as "statutory tenant". As the defendant did not comply with the notice to quit the plaintiff brought these proceedings to secure posses-

sion on the ground that the defendant was not a statutory tenant from the beginning because the agreement was a mere licence and did not have the effect of a tenancy agreement.

Held, dismissing the claim: (1) in determining whether an agreement is a lease or a licence one must not look so much at the words as the substance of the agreement and each case must be decided on its own merits and in the light of the circumstances disclosed;

(2) there were a number of circumstances in the present case which in their totality led to the conclusion that the agreement should be construed as creating a tenancy and not a licence. Accordingly the defendant was entitled to the protection of the Rent Control Ordinance.

Cases referred to:—

(1) *Ong Guan Tee* v. *Kho Hai Kheng & Anor.* [1950] S.C.R. 28 at p. 32.

(2) *Tan Hock Seng* v. *Kueh Kim Eng* [1954] S.C.R. 53.

(3) *Frank Warr & Co. Ltd.* v. *London County Council* [1904] 1 K.B. 713.

(4) *Haji Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45.

(5) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1955] 3 All E.R. 864.

(6) *Chin Chak* v. *Tan Kee alias Tan Kee Chiang* [1958] S.C.R. 121.

(7) *Abbeyfield (Harpenden) Society Ltd.* v. *Woods* [1968] 1 W.L.R. 374 at p. 376.

(8) *Errington* v *Errington* [1952] 1 All E.R. 149 at p. 155.

(9) *Addiscombe Garden Estates Ltd.* v. *Crabbe* [1957] 3 All E.R. 563 at p. 570.

(10) *Finbow* v. *Air Ministry* [1963] 2 All E.R. 647 at p. 653.

CIVIL SUIT.

C.C. Joseph for the plaintiff.

C.J. Wong for the defendant.

Cur. Adv. Vult.

B.T.H. Lee J.: Kuo Geok Sui (f), plaintiff, sought possession from the defendant, Ling Ping Kwong, of a shop-house, No. 65 Channel Road, Sibu (apart from a room at the back of the second floor).

By a letter written in Chinese dated 25th September, 1967, the plaintiff gave notice to the defendant informing him of her desire to recover possession of the licensed premises for her own use after expiration of the renewed licence to occupy the licensed premises. Notwithstanding that notice the defendant remained in occupation of the premises. Everything went on as before.

No move was made by the plaintiff to recover possession of the shop-house until 29th February, 1968 when the solicitors acting on behalf of the plaintiff on the basis that the occupancy was a tenancy gave notice to the defendant in the following terms:—

"Mr. Ling Ping Kwong,
c/o Hai Ping Hotel,
65 Channel Road,
Sibu.

Notice To Quit

As solicitors of Madam Kuo Geok Sui your landlord and in pursuance to section 19(b) of the Rent Control Ordinance, we hereby give you one month's notice from the 1st day of March, 1968 and expires on the 31st day of March, 1968 to quit and deliver up to our client's possession of the 1st and 2nd floors of the shophouse premises known as Hai Ping Hotel situate at 65 Channel Road, Sibu held by you as statutory tenant of our client at the monthly rent of $300.

Take notice that in case of any refusal or neglect on your part to comply with this notice and demand, an action for ejection or other legal proceedings will be commenced against you without further notice.

Dated this 29th day of February 1968.

Signed Seah & Tang Co.
Solicitors for Kuo Geok Sui."

By an agreement written in Chinese made between the plaintiff and defendant, it was provided as follows:—

"THE AGREEMENT is hereby made between KUO GEOK SUI, the Proprietress of shop-house No. 65, situate at Channel Road, Sibu and LING PING KWONG. The premises to *let*, excluding the front portion of the said shop-house, including the first and second floors, together with all furniture in Hai Ping Hotel. The former is desirous of *letting* the above whole premises to the latter for him to do business.

The stipulations and terms hereinafter agreed by both parties are as follows:—

1. The monthly rent of $300 only payable at the end of each and every month.
2. The rental period is one year, commencing from the date of signing the said agreement. Upon the expiration of the agreement, a renewal is allowed, subject to the consent of both parties.
3. A room at the back of second floor has to be made for the proprietress's own use but the space of which must not be within the existing demised hotel-room(s). Subject to liberty, the space of 20 feet at the back of first floor be reserved in case the proprietress wants the said space to be altered in future but it must not obstruct both bath-room(s) and toilet(s) of the hotel.
4. The proprietress shall be responsible for the repair respecting leaking from roof, damages on gutters, payments of quit rent and assessment rates assessed by council.
5. The *tenant* shall make no claim or allowance(s) whatsoever if the proprietress wishes to exercise her right in re-possessing her premises.
6. The *tenant* shall have no right to transfer this sort of business to another person.
7. If the proprietress wishing to re-possess the premises for her own use or for trading by herself shall at the expiration of the terms hereby given give to the *tenant* three months' previous notice. And then, this agreement may be dissolved. On the other hand, the dissolution of this agreement could also be taken place if the tenant is not desirous of continuing renting the premises may be given to the proprietress one month's previous notice.
8. The details of the hotel's furniture are separately listed out in two copies. Each party keeps a copy.

(Furniture listed are in accordance with the old list. For particular attention, 8 chairs being damaged).

It is feared that the verbal promise bears no proof. This agreement is hereby made in both original and duplicate copy for each to keep a copy for reference.

Stamp $1.30 affixed.

Proprietress (Signed) Kuo Geok Sui
Tenant (Signed) Illegible
Witness (Signed) Illegible
(Sealed) Kong Tung Seng
Headman of Area? Sibu, Sarawak.

Made on this 4th day of January, 1966.

(1) This agreement has been renewed for one more year.

(2) To commence from the year 1967, the repairs on roof and gutters shall be borne by person who *rents* it. Such matter on repairs shall have no connection with the proprietress.

(3) To commence from the year 1967, the supplementary furniture, if added, shall all be the properties of the proprietress. The person *renting* the premises must not remove them away when he vacates the said premises.

Person renting premises: (Sgd.) Illegible."

It must be mentioned here that upon payment of the monthly sums the plaintiff issued receipts headed "Shop Rent Receipts".

It is vital to the plaintiff's claim for possession of the premises that she should be able to establish that the agreement purportedly a a licence is in truth a licence as opposed to a tenancy agreement. If it is a mere licence, then the plaintiff's claim to possession must follow. If, on the other hand, although described as a licence as contended by the plaintiff, it has the effect of a tenancy agreement then *prima facie* the plaintiff must be forced before she can get possession to undertake the task of compliance with the provisions of the Rent Control Ordinance (Sarawak Cap. 86). Counsel for the plaintiff in support of his arguments that the agreement must be construed as a mere licence and not a tenancy referred the court to a number of authorities. Counsel for plaintiff contended that if the defendant is not a "statutory tenant" from the beginning, the defendant cannot claim any protection under the Rent Control Ordinance (Sarawak Cap. 86).

Counsel sought reliance on the case of *Ong Guan Tee* v. *Kho Hai Kheng & Anor.*[1] for the proposition that a person does not become a "statutory tenant" unless he is protected by the provisions of the Ordinance at the time his previous tenancy terminated.

Much reliance has been placed by counsel on the passage of *Sarkar on Evidence* 11th Edition at page 186:—

"Effect of Admission on a Point of Law"

"An erroneous admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel and the court is not precluded from deciding the rights of the parties on a true view of the law."

Again at page 1078 of the same book:—

'A party's opinion as to the legal effect of certain facts does not create any estoppel."

The second case cited was *Tan Hock Seng* v. *Kueh Kim Eng*[2] where Lascelles J. stated at page 54:—

"I do not place too much reliance on the words 'rent' and 'let' especially when the original document was written up in Chinese and has to be translated." (As they were done in this case).

and further down on the same page is stated:—

"The principal test as to whether or not a tenancy exists is whether the alleged tenant has the right to exclusive possession of a part of the premises sufficiently clearly defined and separated from the other parts as to be capable of being the subject of exclusive possession."

Reliance was also placed on the case of *Frank Warr & Co., Limited* v. *London County Council*[3] which decided that the contract in that case conferred only a personal privilege.

It was also contended by counsel for the plaintiff that the conditions of the agreement appeared to be more consistent with the relationship of a licensor and licensee rather that that of landlord and tenant.

The defendant in his defence claimed that he was a lawful tenant of the premises at a monthly rent of $300. It was contended that the terms of the agreement contained all the indicia of a monthly tenancy. It is to be observed that since January 1968 the plaintiff refused to accept the monthly rents although they were tendered by the defendant.

By plaint stated that:—

the defendant says that the letting in the year

"With regard to paragraph 2 of the statement of claim, the plaintiff to the defendant for the defined and 1966 by the ice as stated in the statement of claim to-definite spa all the furniture and utensils for the running gether with business at the monthly rental of $300 *per* of a hotel is a tenancy and not a licence."

mensem was statement, it falls to be noted, was not

This l either in reply or during the hearing challenge se.

of this ca ms to me that the parties are bound by

It see dings and it is the duty of a judge to their plea case on the issues on the record. If decide a for this is necessary it will be found authority urt of Appeal judgment in the case of in the Co aragraph 2 of the statement of defence, *Haji Mok Co. Ltd.* v. *Southport Corporation.*[5] *Petroleum* aw was laid down as long ago as 1958

The lurt of Appeal at Kuching.

by the Co I would quote a passage from the

Here of Williams C.J. in *Chin Chak* v. *Tan* judgment *Tan Kee Chiang.*[6] His Lordship said *Kee alias* 128):—

(at page sire to point out for the benefit of magis-

"We d the question whether a tenancy or a licence trates that as been granted is one of fact in each parti- to occupy h

cular case. To arrive at the proper conclusion attention might primarily be given to the following points:—

(i) whether the occupant had exclusive possession, bearing in mind the purposes for which he desired to use them;

(ii) whether anything in the written or verbal agreement indicated an intention to create a tenancy rather than a licence;

(iii) the terms of the agreement, e.g. the period of the occupancy and the provisions for termination."

Again at page 127 Williams C.J. said:—

"Whether or not parties intend to create as between themselves the relationship of landlord and tenant is in the last resort a question of intention. Indeed the decisive consideration is the question of intention — *Booker* v *Palmer* [1942] 2 All E.R. 674. The intention must here be ascertained from the nature of the written agreement and other facts of the case."

Equally explicit is the observation of Lord Denning in the case of *Abbeyfield (Harpenden) Society Ltd.* v. *Woods*:—[7]

"The modern cases show that a man may be a licensee even though he has exclusive possession even though the word 'rent' is used, and even though the word 'tenancy' is used. The court must look at the agreement as a whole and see whether a tenancy really was intended."

There is another case to which perhaps I might usefully refer and that is the case of *Errington* v. *Errington* [8] where Denning L.J. in the course of his judgment said:—

"The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one."

However, we have the authoritative guidance from the Court of Appeal in *Addiscombe Estates, Ltd.* v. *Crabbe* [9] where Jenkins L.J. referred to the *dicta* by Denning L.J. as follows:—

"We have had many cases lately where an occupier has been held to be a licensee and not a tenant. In addition to those which I mentioned in *Errington* v. *Errington & Woods* ([1952] 1 All E.R. 149) we have recently had three more, *Gorham (Contractors). Ltd.* v. *Field* (unreported), *Forman* v. *Rudd* (unreported), and *Cobb* v. *Lane* ([1952] 1 All E.R. 1199). In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of frienlship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all. In the present case however, there are no special circumstances. It is a simple case where the employer let a man into occupation of a house in consequence of his employment at a weekly sum payable by him. The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put on it (and he cites *Customs & Excise Commrs.* v. *Pools Finance (1937), Ltd.* ([1952] 1 All E.R. 775).) It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven — I will not in these days say a coach and four — but an articulated vehicle."

Before passing from the matter I ought perhaps to refer very briefly to a case which was later than *Addiscombe Estates Ltd.* v. *Crabbe*. It was a decision made six years later where this principle was very closely and carefully examined. It is clear that the court did not intend to depart from the law laid down by Denning L.J. and cited above for in the same judgment that *dictum* is referred to and accepted as a correct statement of law.

McNair J. in *Finbow* v. *Air Ministry* [10] said:—

"In my judgment these authorities do establish the following principles at least:— (i) that the agreement must be construed as a whole and that the relationship is determined by the law and not by the label which the parties put on it, though the label is a factor to be taken into account in determining the true relationship (see *Facchini* v. *Bryson; Addiscombe Garden Estates, Ltd.* v. *Crabbe*); (ii) that the grant of exclusive possession if not conclusive against the view that there is a mere licence as distinct from a tenancy, is at any rate a consideration of the first importance (see Jenkins L.J. in the *Addiscombe* case); (iii) that in all cases where an occupier has been held to be a licensee 'there has been something in the circumstances such as a family arrangement an act of friendship or generosity, or such like to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all' (see Denning L.J. in *Facchini's* case)."

At this stage it will be convenient for me to turn to an examination of the agreement in the light of the authorities cited in order to determine whether it is a licence or a tenancy.

I think one must not look so much at the words as the substance of the agreement. Each case must be decided on its own merits and in the light of the circumstances disclosed.

According to the agreement, as a whole, it seems to me that the parties have clearly attempted by means of this agreement (albeit written in Chinese) to create a contractual position under which the defendant has in substance all the rights of a tenant.

The period of the agreement, it is observed, is expressed for a period of one year and renewable (which in this case was in fact renewed for one year). It would therefore appear that there is a term certain which would, in my opinion, be appropriate to the grant of a tenancy.

The next provision of some significance is the provision permitting the plaintiff to repossess the premises for her own use after three months' notice. The importance of this provi-

sion is that it shows that the right to occupy the premises conferred on the defendant was intended as an exclusive right.

It is also perhaps of some significance that the parties are not related but were entering into a business relationship unlike the parties in *Errington* v. *Errington.*

Further the issue of rent receipts marked "Shop Rent Receipts" rather than an ordinary receipt for the payment of money seems to me to support an intention to create a tenancy.

There are therefore a number of circumstances in the present case which in their totality have led me to the conclusion that this agreement should be construed as creating a tenancy and not a licence.

There is, however, one further matter to which I would refer before leaving this case. The question of estoppel was raised by the defendant as a ground for saying that the agreement was a tenancy.

In view of the conclusion at which I have arrived in regard to the relationship of the parties I do not think it is necessary for me to decide the question, indeed my decision is not dependent upon that point.

I therefore hold on the issues stated that the relationship between the parties is not that of licensor and licensee but that of landlord and tenant and I therefore find as a fact that Ling Ping Kwong is a tenant.

There will therefore be judgment for the defendant with costs.

The defendant is hereby ordered to pay to the plaintiff all rents from January 1968 up to date of judgment.

Judgment for the defendant.

TAN TING KOK v. CHEONG LEP KEEN & ANOR.

[F.C.(Azmi L.P., Suffian F.J. and Yong J.) January 11, 1969]

[K.L. — Federal Court Civil Appeal No. X.58 of 1968]

Practice and Procedure — Appeal — Notice of — Service on respondents or their solicitors — Federal Court (Civil Appeals) (Transitional) Rules, 1963, rr. 6 & 7.

The appellant had given notice of appeal but failed to serve the notice on the respondents as required by rule 7 of the Federal Court (Civil Appeals) (Transitional) Rules. An application for leave to serve the notice of appeal out of time was rejected. It was argued that notwithstanding the failure to give notice to the respondents the appeal was properly before the court and could be proceeded with.

Held: rules 6 and 7 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 must be read together and when a notice of appeal is filed with the court, a copy must at the same time be served on the respondents or their solicitors and if this is not done the appeal has not been properly brought before the court and cannot be proceeded with.

Case referred to:—

(1) *Gurbachan Singh* v. *Seagrott & Campbell* [1962] M.L.J. 370.

Ratnam v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228, P.C. was also cited in argument.

FEDERAL COURT.

Dato' S.P. Seenivasagam for the appellant.

N.A. Marjoribanks for the respondents.

Cur. Adv. Vult.

Suffian F.J. (delivering the judgment of the court): In this case judgment was given against the defendant on 31st July, 1968. He was dissatisfied and gave notice of appeal on 21st August, but failed to serve the notice on the plaintiffs as required by rule 7 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963. That rule requires the notice of appeal to be served on the plaintiffs or their solicitors *at the time of filing the notice of appeal.* Dato' Seenivasagam for the defendant applied for leave to serve the notice of appeal on the plaintiffs out of time, but we have rejected that application.

He next submits that, notwithstanding the absence of leave, this appeal is properly before the court and he applies for leave to proceed with the appeal. He says that under the rules there are two distinct steps governing civil appeals:

(a) first, the defendant should *give* notice of appeal under rule 6; and

(b) the defendant should *serve* notice of appeal on the plaintiffs under rule 7.

Dato' Seenivasagam argues that step (a) is quite distinct from and independent of step (b), that rule 7 need not be strictly adhered to, that non-compliance with it is not fatal, and that once notice of appeal has been given by the defendant's filing it in court, the appeal is properly before the court and the court can therefore proceed to hear it. He submits that the decision of the Court of Appeal in *Gurbachan Singh* v. *Seagrott & Campbell* (1) was in error. We regret that we are unable to agree with him. We cannot find any reason to differ from the reasoning in *Gurbachan Singh's* case. In our judgment, rules 6 and 7 must be read together and when notice of appeal is filed with the court, a copy must *at the same time* be served on the respondents or their solicitors. There is no difficulty about doing this if the respondents or their solicitors are in the same town. Equally there is no difficulty if they are in a distant State, because rule 32(1)(b) allows service by posting the document by prepaid registered post